

10

United States

5

Circuit Court of Appeals

For the Ninth Circuit.

B. T. McCAULEY, Director of Game of the State of Washington, B. M. BRENNAN, Director of Fisheries of the State of Washington, E. M. BENN, Inspector of the Department of Fisheries of the State of Washington, and GUY BURNHAM, Game Protector of the State of Washington,

Appellants,

vs.

MAKAH INDIAN TRIBE, a corporation, CHARLES E. PETERSON, PAUL PARKER, ARTHUR CLAPLANHOO, JERRY McCARTHY and HAROLD IDES, individually and members of the Council of the Makah Indian Tribe,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,

Northern Division

FILED
DEC - 9 1941

United States
Circuit Court of Appeals

For the Ninth Circuit.

B. T. McCAULEY, Director of Game of the State of Washington, B. M. BRENNAN, Director of Fisheries of the State of Washington, E. M. BENN, Inspector of the Department of Fisheries of the State of Washington, and GUY BURNHAM, Game Protector of the State of Washington,

Appellants,

vs.

MAKAH INDIAN TRIBE, a corporation, CHARLES E. PETERSON, PAUL PARKER, ARTHUR CLAPLANHOO, JERRY McCARTHY and HAROLD IDES, individually and members of the Council of the Makah Indian Tribe,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic: and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Affidavit of Charles E. Peterson, et al.....	20
Answer	27
Appeal:	
Bond on	59
Designation of Record on.....	69
Notice of	58
Statement of Points on.....	64
Attorneys of Record, Names and Addresses of	1
Bond, Cost, on Appeal.....	59
Certificate of Clerk to Transcript of Record.....	61
Complaint, Bill of.....	2
Exhibit attached, Treaty with the Makah, 1855	13
Conclusions of Law.....	52
Decision, Memorandum, of District Judge.....	33
Decree	55
Designation of Record on Appeal.....	69
Findings of Fact and Conclusions of Law.....	43
Injunction, Preliminary	24

	Page
Motion of Defendants to Dismiss on Special Appearance	23
Motion of Defendant to Dismiss, or in the Alternative for Judgment on the Pleadings.....	30
Names and Addresses of Counsel.....	1
Notice of Appeal.....	58
Special Appearance and Motion to Dismiss.....	23
Statement of Points on Appeal.....	64
Stipulation that Motion for Judgment on the Pleadings May be Determined by a Single District Judge in Event 3-Judge Court Is Without Jurisdiction	32

NAMES AND ADDRESSES OF COUNSEL.

Messrs. SMITH TROY and T. H. LITTLE,
Attorneys for Appellants,
Olympia, Washington.

Messrs. VANDERVEER, BASSETT &
GEISNESS,
Attorneys for Appellees,
1311 Alaska Building,
Seattle, Washington. [1*]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 268.

MAKAH INDIAN TRIBE, a corporation,
CHARLES E. PETERSON, PAUL PARK-
ER, ARTHUR CLAPLANHOO, JERRY
McCARTY and HAROLD IDES, individu-
ally and as member of the council of the Makah
Indian Tribe,

Plaintiffs,

vs.

B. T. McCAULEY, B. M. BRENNAN, E. M.
BENN and GUY BURNHAM,

Defendants.

*Page numbering appearing at foot of page of original certified
Transcript of Record.

BILL OF COMPLAINT.

To the Honorable Judge of the District Court of the United States, for the Western District of Washington, Northern Division:

Come now the Makah Indian Tribe a corporation, Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarty and Harold Ides, members of the council, and plaintiffs herein, and for cause of action against the defendants, allege as follows:

I.

That the Makah Indian Tribe is a federal corporation chartered under the laws of the United States with headquarters at Neah Bay, Washington, which has completed its organization under said laws and is a recognized and existing Indian organization.

II.

That the governing body of the Makah Indian Tribe, a corporation, consisting of a council known as the Makah Tribal Council or Council of the Makah Indian Tribe, which said council consists of five (5) members as follows, to-wit: Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarty and Harold Ides.

III.

That all of the members of said Makah Indian Tribe are Makah Indians, and that this action is brought by said corporation and [2] its tribal council for and on behalf of all of the members of the

said tribe and on behalf of all of the Makah Indians by virtue of the power of authority there invested by the constitution and the charter of the said tribe and the laws of the United States under which said corporation was organized and now exists.

IV.

That the individual plaintiffs, in their individual capacity, bring this action on their own behalf and also on behalf of all of the other members of the said Makah Tribe of Indians who are similarly affected by the action of the defendants hereinafter described.

V.

That all of the individual plaintiffs and all of the members of the said Makah Indian Tribe, for and on behalf of whom this suit is instituted, are citizens of the United States; that the Makah Indian Tribe, a corporation, consists of numerous Makah Indians who are duly enrolled and recognized members of said tribe, as will be shown on the records of the Taholah Indian Agency.

VI.

That the defendant B. T. McCauly is the director of the Department of Game and Game Fish in the State of Washington and is now a resident of Seattle, King County, Washington, within the Northern Division of the Western District of Washington, and within the jurisdiction of this Court.

VII.

That the defendant B. M. Brennan is the director of the Department of Fisheries of the State of Washington and is now a resident of Seattle, King County, Washington, and within the Northern Division of the Western District of Washington and within the jurisdiction of this Court. [3]

VIII.

That the defendant E. M. Benn is an inspector and game protector in the Department of Fisheries and Department of Game and Game Fish of the State of Washington, and is now a resident of Port Angeles, Clallam County, Washington, within the Northern Division of the Western District of Washington, and within the jurisdiction of this Court.

IX.

That the defendant Guy Burnham is a game protector in the Department of Game and Game Fish of the State of Washington, and is now a resident of Forks, Clallam County, Washington, within the Northern Division of the Western District of Washington, within the jurisdiction of this Court.

X.

That on the 31st day of January, 1855, Articles of Agreement and Convention were made and concluded at Neah Bay, in the Territory of Washington, between the United States of America, acting through its duly authorized agent and representative, and the Makah Tribe of Indians acting through

its chiefs and head men and delegates of the several villages of said tribe, thereunto duly authorized; that this treaty was ratified by the Senate of the United States March 8, 1859, and accepted and proclaimed by the President of the United States as the law of the land on April 18, 1859, which treaty thereby promised, guaranteed and secured to the members of the Makah Tribe of Indians, and to their posterity and successors in interest the right and privilege of taking fish at the usual and accustomed ground and stations; that at all times since it was originally made and concluded as aforesaid, said treaty has been and still is in full force and effect; that a true and correct copy of said treaty is attached hereto marked "Exhibit A" and incorporation into this bill of complaint by this reference.

[4]

XI.

That this cause of action arises under the aforesaid treaty of the United States with the Makah Tribe of Indians.

XII.

That from time immemorial, the Indians of the Makah Indian Tribe were accustomed to fish in the Hoko River, from its mouth up to the spawning grounds of the fish in said river, in Clallam County, State of Washington, and that from time immemorial the whole of said Hoko River, from its mouth up to the aforesaid spawning grounds of the fish, has been a usual and accustomed fishing ground

for the Indians of the Makah Tribe, where said Indians were accustomed to fish with seines, set nets, dip nets and other Indian fishing gear, at various, usual and accustomed stations well known to the defendants; that both the Hoko River and the land and territory constituting the Makah Indian Reservation, reserved from the lands and territory ceded by said treaty by the Government of the United States, are in the northwest portion of Clallam County, Washington.

XIII.

That by reason of the reservation of the usual and customary fishing rights and privileges in and along the Hoko River as hereinbefore described in this bill of complaint, and by reason of the governmental guarantee that such rights would be secured to the members of the Makah Indian Tribe, said plaintiffs herein and the members of the Makah Tribe of Indians, and all of them, continuously since said treaty was made and until stopped by the defendants as hereinafter set forth, took fish from the Hoko River with seines, set nets and dip nets, and any and all other Indian fishing gear but were and are prevented from so doing by the wrongful acts of the defendants hereinafter described, although they still claim the right and privilege and attempted so to do; that the fishing [5] rights as claimed and exercised with which the defendants are unlawfully interfered as hereinafter set forth, were a portion of those fishing rights and privileges

guaranteed by the aforesaid treaty with the Makah, and were prior in point of time and interest to the alleged fishing rights of any white men or company or corporation whatsoever, or the State of Washington; that during all times until the year 1933, or immediately prior to first of said year, the plaintiffs herein and all of the members of the Makah Tribe of Indians for and on behalf of whom this action is brought, the posterity of the members of the Makah Tribe of Indians at the date the aforesaid treaty with the Makahs were made and concluded, their forbears and predecessors, were not interfered with or molested in the exercise of their fishing rights and privileges in and upon the Hoko River, and that until 1933, or immediately prior thereto, the State of Washington and its duly authorized agents and employees acquiesced and recognized the fishing rights as exercised and herein claimed.

XIV

That at all times since about the first of the year 1933, the defendants, their agents, assistants and employees, have interfered with and intentionally deprived the Tribe of Makah Indians, and the individual plaintiffs herein, of their rights and privileges of taking fish from their usual and accustomed place of fishing in the Hoko River and have intentionally prevented any fishing in any part of the Hoko River, by threatening to arrest and confiscate the fishing gear and equipment of any members of

said tribe fishing in or upon their aforesaid accustomed and usual fishing grounds and stations in the Hoko River, and the defendants will, unless enjoined and restrained by this Court, arrest any and all members of the Makah Tribe of Indians fishing in the Hoko River or any part thereof, and will also confiscate all their fishing gear and equipment; [6] that the Makah Tribe of Indians is now and from time immemorial has been dependent to a very substantial degree upon fishing for food and livelihood, and that circumstance was recognized by the representative of the United States Government when the aforesaid treaty with the Makah Tribe of Indians was made; that the Hoko River is and since time immemorial has been an important and valuable fishing place and that to deprive them of their rights to fish in said river irreparably damages the plaintiffs and the members of the plaintiff Indian Tribe in an amount which cannot be determined and materially impairs their principal source of food and livelihood.

XV.

That the value of the right in controversy exceeds for each of the above-named plaintiffs, exclusive of interest and costs, the sum of \$3,000.00.

XVI.

That neither the plaintiffs nor any of the members of the Makah Tribe of Indians nor any of their predecessors in interest, have at any time sold, assigned, transferred or conveyed his or their rights

or privileges nor any part thereof, in and to the fishing at and in the Hoko River, or any part thereof, to the defendants or to anyone whomsoever, nor have the plaintiffs herein or any of them, or any of the members of the said Makah Tribe of Indians in particular, abandoned said fishing place or places, or his or the rights of the individual plaintiffs and the other members of the Makah Tribe of Indians to fish therein, nor has the United States of America ever in any manner limited or disposed of the fishing rights of the Makah Tribe of Indians.

XVII.

That all of the acts, claims and pretenses, threats and arrests made by the defendants, their officers, agents, assistants and employees, are contrary to law and equity and good conscience [7] and tend to the manifest damage and oppression of the Makah Tribe of Indians, and of the plaintiffs herein named, and that the said defendants and each of them will continue, unless prevented by this Court, to deprive the said Tribe and plaintiffs herein, of their ancient, usual and accustomed fishing rights claimed under the aforesaid treaty between the United States of America and the Makah Tribe of Indians.

XVIII.

That the plaintiffs have no speedy or adequate remedy at law and can have no adequate remedy in equity except in this Court having jurisdiction thereof, that the defendants, and each and all of

them, their officers, agents and employees will, by arrests and imprisonment and confiscation of property, entirely prevent the plaintiffs herein and the Makah Indians from operating their seines, set nets, dip nets and other fishing gear unless they and each of them be enjoined by an injunction issued by this Court restraining and prohibiting said defendants and each of them from in any manner whatsoever interfering with the fishing operations and rights of the said Makah Indians in the Hoko River.

Wherefore, the plaintiffs, and each of them, pray for a decree of this Court as follows:

(1) Establishing that the entire Hoko River, from its mouth up to the spawning grounds of the fish on said river, is one of the usual and accustomed fishing places of the Tribe of Makah Indians, to which their rights and privileges of fishing were reserved by the treaty with the Makah made and concluded January 31, 1855 and proclaimed by the President of the United States April 18, 1859.

(2) Establishing the rights and privileges of these plaintiffs, and each of them and of all of the members of the Makah Tribe of [8] Indians to fish in their above-described usual fishing place by reason of their priority in time and interest and by reason of their treaty rights and privileges.

(3) Permanently enjoining and restraining the defendants and each and all of them, together with their officers, agents, deputies, servants and employees, and all persons under their control or under the control of any of them, from in any manner

whatsoever interfering with or depriving the plaintiffs herein, or any of the members of the Makah Tribe of Indians of their rights and privileges of fishing in their usual and accustomed fishing place hereinabove described.

The plaintiffs further pray that this Honorable Court, after due notice to the defendants, and each of them, issue its preliminary injunction restraining and enjoining the defendants and each of them, together with their agents, assistants, deputies and all persons acting by or under their control, or by, through or under the authority or direction of said defendants, or any of them, from in any manner interfering with the plaintiffs herein, or any of the members of the Makah Tribe of Indians while fishing upon the fishing grounds described and set forth in this bill of complaint, and from interfering with or preventing the plaintiffs herein or any of the members of the Makah Tribe of Indians, from selling their fish caught and taken upon the fishing grounds described in this bill of complaint, until the further order of the Court; and that this Court issue its order directed to the said defendants and each of them requiring them to show cause, if any they have, on a date certain and at a place to be fixed by this Court, why such preliminary injunction should not be issued and should not be continued in full force and effect during the pendency of this action.

The plaintiffs further pray that they may have such other and [9] further and different relief as the nature of this cause may require and as to this

Honorable Court may seem just and equitable and that they have and recover their costs and disbursements herein.

VANDERVEER, BASSETT &
GEISNESS,
Attorneys for Plaintiffs.

United States of America,
Western District of Washington,
Northern Division—ss.

We, Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarty and Harold Ides, and each of us, being first severally duly sworn, depose and say: That we are each plaintiffs in the above entitled suit and that the facts set forth in the foregoing Bill of Complaint are true as we and each of us verily believe; that this verification is made on behalf of each of us and all of the other plaintiffs herein, and of all of the Indians, members of the Makah Indian Tribe; that we are all members of the Council of the Makah Indian Tribe, and that we are authorized to and to make this verification for and on behalf of the said Makah Indian Tribe, a corporation.

(Seal)

CHARLES E. PETERSON,
PAUL PARKER,
ARTHUR CLAPLANHOO,
JERRY McCARTY,
HAROLD IDES.

Subscribed and sworn to before me this 24th day of September, 1940.

T. F. TRUMBULL,
Notary Public in and for the State of Washington,
residing at Port Angeles. [10]

EXHIBIT A

Treaty with the Makah, 1855

Jan. 31, 1855

12 Stat., p. 939

Proclamation, Apr. 18, 1859

Ratified Mar. 8, 1859

Articles of Agreement and convention, made and concluded at Neah Bay, in the Territory of Washington, this thirty-first day of January, in the year eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian Affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the several villages of the Makah Tribe of Indians, viz: Neah Waatch, Tsoo-Yess, and Osett, occupying the country around Cape Classett or Flat-tery, on behalf of the said tribe and duly authorized by the same.

Article I. The said tribe hereby cedes, relinquishes, and conveys to the United States all their right, title, and interest in and to the lands and country occupied by it, bounded and described as follows, viz: Commencing at the mouth of the Oke-ho River, on the Straits of Fuca; thence run-

ning westwardly with said straits to Cape Classett or Flattery; thence southwardly along the coast to Osett, or the Lower Cape Flattery; thence eastwardly along the line of lands occupied by the Kwe-deh-tut or Kwill-eh-yute tribe of Indians, to the summit of the coast-range of mountains, and thence northwardly along the line of lands lately *deded* to the United States by the S'Klallam tribe to the place of beginning, including all the islands lying off the same on the straits and coast.

Article II. There is, however, reserved for the present use and occupation of the said tribe the following tract of land, viz: Commencing on the beach at the mouth of a small brook running into Neah Bay next to the site of the old Spanish fort; thence along the shore round Cape Classett or Flattery, to the mouth of another small stream running into the bay on the south side of said cape, a little above the Waatch village; thence following said brook to its source; thence in a straight line to the source of the first-mentioned brook, and thence following the same down to the place of beginning, which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; but if necessary for the public convenience, roads may be run through said reservation, the Indians being compensated for any damage thereby done by them. It is, however, understood

that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band to occupy the same in common with those above mentioned, he shall be at liberty to do so.

Article III. The said tribe agrees to remove to and settle upon the said reservation, if required so to do, within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the meantime it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

Article IV. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privileges of hunting and gathering roots and berries on open and unclaimed lands: provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

Article V. In consideration of the above cession the United States agree to pay to the said tribe the sum of thirty-thousand dollars, in [11] the following manner, that is to say: During the first year after the ratification hereof, three thousand dollars; for the next two years, twenty-five hundred

dollars each year; for the next three years, two thousand dollars each year; for the next four years, one thousand five hundred dollars each year; and for the next ten years, one thousand dollars each year; all which said sums of money shall be applied to the use and benefits of the said Indians, under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

Article VI. To enable the said Indians to remove to and settle upon their aforesaid reservation, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve. And any substantial improvements heretofore made by any individual Indian, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made therefor accordingly.

Article VII. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted thereby, remove them from said reservation to such suitable places within said Territory as he

may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands; and he may further, at his discretion, cause the whole, or any portion of the lands hereby reserved, or such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be practicable.

Article VIII. The annuities of the aforesaid tribe shall not be taken to pay the debts of individuals.

Article IX. The said Indians acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens thereof, and should anyone or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision and abide thereby. And if any of the said Indians commit any depredations

on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in case of depredations against citizens. And the said tribe agrees not to shelter or conceal offenders against the United States, but to deliver up the same for trial by the authorities.

Article X. The above tribe is desirous to exclude, from its reservation the use of ardent spirits, and to prevent its people from [12] drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Article XI. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribe in common with those of other tribes of said district and to provide a smithy and carpenter's shop, and furnish them with the necessary tools and employ a blacksmith, carpenter, and farmer for the like term to instruct the Indians in their respective occupations. Provided, however, that it should be deemed expedient a separate school may be established for the benefit of said tribe and such others as may be associated with it, and the like persons employed for the same purposes at some other suitable place.

And the United States further agree to employ a physician to reside at the said central agency, or at such other school should one be established, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States and not deducted from the annuities.

Article XII. The said tribe agrees to free all slaves now held by its people, and not to purchase or acquire others hereafter.

Article XIII. The said tribe finally agrees not to trade at Vancouver Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in its reservation without consent of the superintendent or agent.

Article XIV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States.

[Endorsed]: Filed in the United States District Court Western District of Washington Northern Division Sep. 30, 1940. Millard P. Thomas, Clerk. By Elmo Bell, Deputy. [13]

[Title of District Court and Cause.]

AFFIDAVIT OF CHARLES E. PETERSON,
PAUL PARKER, ARTHUR CLAPLANHOO,
JERRY McCARTY AND HAROLD IDES.

United States of America

Western District of Washington

Northern Division—ss.

Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarty and Harold Ides, being first severally duly sworn each for himself, deposes and says: The affiants named in the above entitled action are the governing body of the Makah Indian Tribe and constitute the Makah Tribal Council.

The Makah Indian Tribe is a Federal corporation chartered under the laws of the United States and comprises the members of the Makah Tribe of Indians. The above entitled action is brought by said corporation and its tribal council for and on behalf of all the members of the tribe and on behalf of all Makah Indians and it is also brought by the individual plaintiffs in their individual capacity in their own behalf and on behalf of the other members of said tribe. The individual plaintiffs, and all of the members of said tribe are citizens of the United States.

The defendants are officials of the Department of Game and Game Fish of the State of Washington and of the Department of Fisheries of the State of Washington. [14]

Under a treaty made January 31, 1855, between the United States of America and the Makah Tribe

of Indians, the members of said tribe are guaranteed and secured the right and privilege of taking fish at all of their usual and accustomed fishing grounds and stations. Said treaty is still in full force and effect.

The Hoko River, from its mouth up to the spawning ground of the fish in said river in Clallam County, Washington, is, and from time immemorial and from a time long prior to the date of the aforesaid treaty has been a usual and accustomed fishing ground for the Indians of the Makah Tribe, where the Indians were accustomed to fish with seines, set nets, dip nets and other Indian fishing gear at accustomed stations well established and known to the defendants, and each of them, and all of said Hoko River is within a few miles of the Makah Indian Reservation.

On January 30, 1855, in the proceedings leading up to the above mentioned treaty, Kalchote of Neah Bay said that he thought he ought to have the right to fish and take whale and get food where he liked. Keh-Tchook of the Stone House (Tatoosh Island) spoke next, saying that what Kalchote had said was his wish, that his country extended up to Hoke-Ho (Hoko River) and that he did not wish to leave the salt water. Governor Stevens then informed them that instead of wishing to stop their fisheries he wished to send them oil kettles and fishing apparatus. Klah-Prathoo of Neah Bay then replied that he was willing to sell his land; all he wanted was the right of fishing.

The defendants threaten to and will, unless restrained, arrest and imprison any Makah Indian fishing in said Hoko River with fishing gear used therein by the Makahs since time immemorial.

The Makah Indians are, and from time immemorial have been, dependent to a very substantial degree upon fishing for food and [15] livelihood and during all of those times the Hoko River has been and still is, an important and valuable fishing place and that deprivation of their rights to fish in said river irreparably damages said Indians in an amount which cannot be determined and materially impairs their principal source of food and livelihood.

The rights of the Makah Indians under said treaty have never been transferred, abandoned or in any wise modified but have been exercised by said Indians continuously from prior to the treaty until the defendants prevented the exercise of said rights as aforesaid.

All of the facts stated in this affidavit are more fully set forth, together with additional facts, in the bill of complaint in the above entitled cause and said bill of complaint, together with its attached Exhibit A, is hereby referred to, incorporated into this affidavit by reference, and the allegations therein contained are hereby adopted as the statements of affiants in this affidavit under oath.

[Seal]

CHARLES E. PETERSON

PAUL PARKER

ARTHUR CLAPLANHOO

JERRY McCARTY

HAROLD IDES

Subscribed and sworn to before me this 24th day of September, 1940.

T. F. TRUMBULL

Notary Public in and for the State of Washington,
residing in Seattle.

[Endorsed]: Filed in the United States District Court Western District of Washington Northern Division Oct. 1 1940. Millard P. Thomas, Clerk. By Elmo Bell, Deputy. [16]

[Title of District Court and Cause.]

SPECIAL APPEARANCE
MOTION TO DISMISS

Come now the defendants in the above entitled cause by Smith Troy, Attorney General, and T. H. Little Assistant Attorney General of the State of Washington, and appearing specially and for the sole purpose of this motion respectfully ask that the service of and the order to show cause issued herein and directed to said defendants be vacated and quashed, and that this cause be dismissed for want of jurisdiction over the defendants or either of them or of the subject matter of the action.

Dated at Olympia, Washington, this 3d day of October, 1940.

SMITH TROY

Attorney General

T. H. LITTLE

Assistant Attorney General

For Defendants, appearing
specially.

Service accepted and receipt of copy acknowledged this 3rd day of October, 1940.

VANDERVEER, BASSETT & GEISNESS

Attorneys for Plaintiffs.

[Endorsed]: Filed in the United States District Court Western District of Washington Northern Division Oct. 10, 1940. Millard P. Thomas, Clerk. By R. Elias Deputy. [19]

[Title of District Court and Cause.]

PRELIMINARY INJUNCTION

This matter came on regularly for hearing on the 14th day of October, 1940, and, after continuance, on the 21st day of October, 1940, before the undersigned Court, upon the application of the plaintiffs for a preliminary injunction and upon the defendants' special appearance and motion to dismiss, the plaintiffs appearing by their attorney, John Geisness of the law firm of Vanderveer, Bassett & Geisness, and the defendants appearing by their attorneys, Smith Troy, Attorney General, and T. H. Little and Harry L. Parr, Assistant Attorneys General of the State of Washington, and oral arguments having been made, written briefs having been submitted on behalf of the respective parties, and

It appearing to the Court from the bill of complaint and the affidavits of the plaintiffs, no affidavits having been submitted by the defendants, that the defendants, B. F. McCauly, Director of the

Department of Game and Game Fish of the State of Washington, B. M. Brennan, Director of the Department of Fisheries of the State of Washington, E. M. Benn, an Inspector and Game Protector in the Department of [20] Fisheries and Department of Game and Game Fish of the State of Washington, and Guy Burnham, Game Protector in the Department of Game and Game Fish of the State of Washington, their officers, agents and employees, threaten to and will, unless enjoined by this Court, interfere with and molest the individual plaintiffs and other members of the Makah Indian Tribe in fishing or exercising their fishing rights at their usual and accustomed grounds and stations on and in the Hoko River from its mouth to the spawning grounds on said River, and the Court being fully advised in the premises;

It is hereby ordered that the defendants' special appearance and motion to dismiss be and is hereby overruled and denied.

It is further ordered that the said defendants, B. F. McCauly, B. M. Grennan, T. M. Benn and Guy Burnham, their officers, agents and employees be and they, and each of them, are hereby restrained and enjoined from in any manner interfering with or molesting the plaintiffs or other members of the Makah Indian tribe in the exercise of their fishing rights at their usual and accustomed grounds and stations on and at the whole of the Hoko River in Clallam County, Washington, from its mouth to the spawning grounds thereon; that the

said individual defendants, and each of them, are further restrained and enjoined from arresting, detaining or restraining said Indians, or in any other manner preventing them from fishing at their usual and accustomed fishing grounds as aforesaid.

This restraining order shall become effective upon the filing by the plaintiffs of a satisfactory bond in the sum of \$500.00 conditioned to pay all damages and costs which may accrue by reason of this preliminary injunction, and copies [21] of this preliminary injunction shall be forthwith served upon the defendants, and each of them.

Dated at Seattle, Washington, this 21st day of October, 1940.

JOHN C. BOWEN,
Judge.

Approved as to form:

HARRY L. PARR,
Assistant Attorney General,
for Defendants.

Presented by:

JOHN GEISNESS,
Attorney for Plaintiffs.

Service accepted of copies of preliminary injunction entered on the 21 day of October, 1940, by the above entitled Court on behalf of the defendants,

B. F. McCauly, B. M. Brennan, E. M. Benn and
Guy Burnham.

SMITH TROY,
Atty. General,
HARRY L. PARR,
Attorney for Defendants.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division, Oct. 21, 1940. Millard P. Thomas, Clerk.
By R. Elias, Deputy. [22]

[Title of District Court and Cause.]

ANSWER.

Come now the defendants and for answer to the
complaint herein admit, allege and deny as follows:

I.

Deny each and every allegation and the whole
thereof of paragraphs I to V inclusive of plaintiffs'
complaint.

II.

Defendants admit paragraphs VI to X inclusive
and paragraph XV of plaintiff's complaint.

III.

In answer to paragraph X of the complaint these
defendants admit the making of the treaty, Exhibit
1, but otherwise deny each, every and all of the
allegations of paragraph X of the plaintiffs' com-
plaint.

IV.

Defendants deny each and every allegation and the whole thereof of paragraph XI of plaintiffs' complaint. [23]

V.

These defendants deny each and every allegation and the whole thereof of paragraphs XII and XIII of plaintiffs' complaint.

VI.

These defendants deny each and every allegation and the whole thereof of paragraph XIV of the complaint.

VII.

Defendants deny each and every allegation and the whole thereof of paragraphs XVI, XVII and XVIII of the plaintiffs' complaint.

For a Further Answer These Answering Defendants Allege and Show the Following:

I.

That the above entitled court lacks jurisdiction over the subject matter of the said complaint.

II.

That said complaint fails to state a cause of action or claim upon which relief can be granted.

III.

That this cause of action is essentially a suit against the State of Washington and that the four defendants named are not the real parties in inter-

est; that they are all state officers and that their actions are in pursuance of a state statute and that the defendants and each of them are not the real parties in interest, but the State of Washington is the real party in interest.

IV.

That the plaintiffs are wards of the United States government and have no capacity to sue save and except as wards of the government of the United States and through and by the United [24] States attorneys for the Western District of Washington.

Wherefore, defendants pray that this cause may be dismissed and that defendants have their costs and disbursements herein.

SMITH TROY,

Attorney General,

T. H. LITTLE,

Assistant Attorney General,

HARRY L. PARR,

Assistant Attorney General,

Attorneys for Defendants.

State of Washington,
County of King—ss.

B. M. Brennan, being first duly sworn, on oath says: That he has read the above and foregoing answer, knows the contents thereof and believes the same to be true; that he makes this verification not only on behalf of himself but on behalf of the other defendants, and that he is authorized so to do.

B. M. BRENNAN.

Subscribed and sworn to before me this 24 day of October, A.D. 1940.

(Seal) GRACE C. BREWER,
Notary Public in and for the State of Washington,
residing at Seattle, Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 24, 1940. Millard P. Thomas, Clerk. By R. Elias, Deputy. [25]

In the United States District Court for the Western District of Washington, Northern Division.

No. 268

MAKAH INDIAN TRIBE, a corporation,
CHARLES E. PETERSON, PAUL PARKER,
ARTHUR CLAPLANHOO, JERRY McCARTY and HAROLD IDES, individually
and as members of the council of the Makah Indian Tribe,

Plaintiffs,

vs.

B. T. McCAULEY, B. M. BRENNAN, E. M. BENN and GUY BURNHAM,

Defendants.

MOTION TO DISMISS OR IN THE ALTERNATIVE FOR JUDGMENT ON THE PLEADINGS.

The defendants move the court as follows:

I.

To dismiss the action on the ground that the court lacks jurisdiction to grant the relief prayed for under Section 266 of the Judicial Code (28 U. S. C. A., sec. 380).

This motion is made under Rule 12 (b), Rules of Civil Procedure.

II.

In the event the foregoing motion to dismiss is denied, defendants move for Judgment on the Pleadings on the ground that the complaint fails to state a claim upon which relief can be granted.

This motion is made under Rule 12 (c), Rules of Civil Procedure.

SMITH TROY,

Attorney General, State of
Wash.,

T. H. LITTLE,

Asst. Attorney General,
State of Washington.

Address: Temple of Justice,
Olympia, Washington.

Attorneys for Defendants.

Service of copy acknowledged this day
of, 1941.

Attorneys for Plaintiffs.

Copy received Feb. 27, 1941.

VANDERVEER, BASSETT &
GEISNESS,

Attorneys for

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 27, 1941. Millard P. Thomas, Clerk. By Truman Egger, Deputy. [26]

[Title of District Court and Cause.]

STIPULATION AGREEMENT.

It Is Hereby Stipulated and Agreed by and between the parties hereto, by and through their respective counsel, that the motion for judgment on the pleadings in the cause herein may be determined by a court of three judges, organized pursuant to Section 266 of the Judicial Code (title 28 U. S. C. A. Section 280) and if such statutory court finds that it lacks jurisdiction the said motion shall be determined and disposed of by a single district judge without a further hearing, unless otherwise ordered by the Court:

Dated this 15th day of April, 1941.

VANDERVEER, BASSETT &
GEISNESS,

Attorneys for Plaintiffs,
SMITH TROY,

Attorney General,
By T. H. LITTLE,
Assistant Attorney General,
Attorneys for Defendants.

[Endorsed]: Filed in the United States District Court Western District of Washington, Northern Division, Apr. 15, 1941. Millard P. Thomas, Clerk. By Truman Egger, Deputy. [30]

[Title of District Court and Cause.]

MEMORANDUM DECISION.

Vanderveer, Bassett & Geisness, Seattle, Washington, Attorneys for Plaintiffs.

Hon. Smith Troy, Attorney General of the State of Washington, Olympia, Washington.

Hon. T. H. Little, Asst. Attorney General of the State of Wash., Olympia, Washington. Attorneys for Defendants.

Bowen, District Judge:

Motion for judgment on the pleadings which consist of the complaint and answer.

The complaint alleges among other things that plaintiff Indians by the Makah Indian Treaty of 1859 were secured in their right to fish at their usual and accustomed grounds and stations including the Hoko River in the Olympic Peninsula of the State of Washington, but that the defendant state officers since 1933 have interfered with and prevented such rights by threatening to arrest plaintiff Indians and to confiscate their fishing gear, and that the defendants will, unless enjoined by this court, continue to so prevent plaintiffs from enjoying such fishing rights in the future, all in violation of such treaty. [32]

By their answer defendants allege (1) that this court is without jurisdiction of the subject matter; (2) that the defendants are state officers, that their acts complained of are in pursuance of a state

statute, that they are not the real parties in interest but that the real party in interest is the State of Washington (which it is argued by reason of the 11th Amendment cannot be sued in this action); (3) that plaintiff Indians are wards of the United States Government and have no capacity to sue except as such wards by the United States Attorney; and (4) that plaintiffs' complaint fails to state a cause of action upon which relief can be granted (under which issue defendants argue and plaintiffs deny that the Makah Indian Treaty is invalid as against the asserted authority of defendant state officers to enforce the state fishing laws, which are nowhere specially set up in the pleadings).

1. This court has jurisdiction of the subject matter of this action because it involves plaintiffs' asserted rights under an Indian treaty with the United States of the alleged value of more than \$3000.00 exclusive of interest and costs, plaintiffs' allegations of such jurisdictional amount being admitted by defendants' answer.

2. This is an action against state officers for relief against their acts alleged to be unlawful because in conflict with plaintiffs' fishing rights under the Makah Indian Treaty with the United States. "The action is not one in its essential nature and effect against the state to enforce a state liability, and so is not repugnant to the Eleventh Amendment" to the U. S. Constitution. *Sampson vs. Brennan*, Cause No. 74 of this Court, Memorandum Decision filed August 3, 1939. See also *Pennoyer vs. McConnaughy*,

140 U. S. 1, 10; *Ex parte Young*, 209 U. S. 123; *Ex parte New York*, 256 U. S. 490, 500. [33]

3. "Plaintiff Indians being citizens of the United States (8 U. S. C. A., Sec. 3) may as other citizens employ counsel of their own choice. They may also in a federal court institute and prosecute an action to enforce their rights under the Constitution, laws or treaties of the United States." *Sampson v. Brennan*, *supra*. See also *Deere v. New York*, 22 F. (2d) 851; *Y-Ta-Tah-Wah v. Rebeck*, 105 Fed. 257, 259; *Lane v. Santa Rosa*, 249 U. S. 110, 113-114.

4. The final issue presented is whether the complaint states a cause of action upon which the requested relief can be granted. In the briefs and at the oral argument counsel have treated and the court will likewise treat this issue as raising the question of the validity of Article IV of the Makah Treaty providing that:

"The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, * * * together with the privileges of hunting and gathering roots and berries on open and unclaimed lands: Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens."

Defendants emphasize that although the right to fish (the only right here in question) is by the

treaty "*further secured*"* to the Indians, such right is so secured only "*in common with all citizens*" of the United States, and therefrom defendants argue that just as are other citizens' fishing rights, so are such rights of the Indians, subject to all reasonable police power legislation and regulation by the state for the preservation and protection of fish and game, that such police power reserved to the people and exercised for them by the state is paramount to all conflicting treaty provisions, that the state fish and game laws are police measures which apply not only to the Indians but alike to all citizens, Indians and others, and that this conflicting [34] treaty provision securing to the Indians their fishing rights must yield to such state police laws.

But does not that argument assume that the Treaty *granted* instead of "*further secured*" to the Indians their fishing rights? Obviously such an assumption is contrary to the fact indisputably established by history and common knowledge. This nation by conquest and treaty acquired the land from the Indians, but before and after every conquest and conflict and after many a treaty the Indians asserted and enjoyed their ancient right to hunt and fish. That ancient right, of all the Indian rights of remotest antiquity, has by this nation and the Indians been regarded as the most sacred right of the Indians and has seldom ever been ques-

*Italics throughout this Decision are by the Court.

tioned. It is believed that, before the Stevens treaties, of which the Makah Treaty is one, the Indians' right to fish in the domain now included in this state never was questioned by public authority or at all, and in this instance it is a most notable fact that subsequent to this Treaty the right to fish "further secured" to the Indians by this Treaty was unfailingly recognized and respected by all until the year 1933, a continuous period of about 75 years.

This Court is of the opinion that as contended by plaintiffs the answer to this question as to the Treaty's validity turns upon the sounder theory that the Treaty *granted* nothing to the Indians, but that the Treaty in truth and in fact merely reserved and preserved inviolate to the Indians the fishing rights which from time immemorial they had always had and enjoyed. This conclusion is rendered inescapable by a fair consideration not only of Article IV, *supra*, but also of all the other provisions of the Treaty. Nowhere in the Treaty can be found a *conveyance* by the United States to the Indians of any property, except the money [35] consideration to be paid by the Government for the lands and rights in the Treaty conveyed by the Indians to the Government. In the Treaty the United States is the sole grantee and the Indians exclusively are the grantors of all the property covered by the Treaty, except that money consideration, and with that single exception the Treaty *conveyed* no property to the Indians. Upon consid-

eration of the conveyance by the Indians of their lands to the Government, the United States by Article IV, supra, solemnly recognized and guaranteed that "The right of taking fish * * * *at usual and accustomed grounds and station is further secured to said Indians* * * *" (emphasis supplied). So it is readily seen the Treaty does not even purport to *grant* any fishing rights. It merely "*further secured*" to the Indians what fishing rights they already had, at their "usual and accustomed grounds and stations".

That conclusion is further fortified by the following statements of the Indian chiefs and head men and of Governor Stevens when they negotiated this Treaty in 1855:

"Kalchote of Neah Bay said that he thought he ought to have the right to fish and take whale and get food where he liked. Keh-Tchook of the Stone House (Tatoosh Island) spoke next, saying that what Kalchote had said was his wish, that his country extended up to Hoke-Ho (Hoko River) and that he did not wish to leave salt water. Governor Stevens then informed them that instead of wishing to stop their fisheries he wished to send them oil kettles and fishing apparatus. Klah-Prathoo of Neah Bay then replied that he was willing to sell his land; all he wanted was the right of fishing." (Affidavit of Charles E. Peterson et al. filed October 1, 1940).

And so by stating the foregoing objects and purposes of the Treaty, the spokesmen for its High Contracting Parties construed it as a solemn declaration and guarantee reserving to the Indians for the Treaty's duration, which those spokesmen undoubtedly then thought would be for all [36] time to come, the sacred fishing rights of the Indians already and from time immemorial enjoyed by them. How then can it be said that the Treaty *granted* any Indian fishing rights? It did not. It merely *reserved* and guaranteed to the Indians those fishing rights which they always before had possessed and enjoyed.

That construction also leads to a denial of defendant's further contention that by the phrase "in common with all citizens of the United States" the treaty provision for the Indians' benefit was intended to be subject to future state police regulation of fish and game, because other citizens' fishing rights are subject to such police regulation. But it is far more probable that by that phrase the Indians merely indicated their willingness to share their pre-existing fishing rights with all citizens, and that the Indians were willing to continue to recognize other citizens' fishing rights then known to the Indians. There is no allegation or showing in this case that the Indians anticipated the possibility that in the future other citizens might have their fishing rights limited by the exercise of state police power or that other citizens' fishing rights as the Indians knew them when the Treaty was made

might in any way be changed. Nor is there allegation or proof here that the Indians knew of or appreciated the present or possible future existence of any state sovereignty which might attempt to limit the fishing rights of either Indians or other citizens. The only sovereignty, other than their own tribal authority, whose power to regulate fishing was understood by the Makah Indians, very likely was our national government, to them the "Great White Father", with whom they were then negotiating a treaty to reserve and further secure to them their fishing rights at their "usual and accustomed" places. [37]

This nation never acquired for its people by conquest, and did not by the Makah Treaty acquire, the pre-existing ancient Indian fishing rights on which the asserted police power could operate. The police power here invoked by defendants does not apply to subjects, such as Indian fishing rights, not possessed by the people, state or nation. The cases of *Kennedy v. Becker*, 241 U. S. 556, and *Ward v. Race Horse*, 163 U. S. 504, limiting or denying Indian treaty fishing rights, relied upon by defendants, are distinguishable upon the ground either that the treaty provisions limited the Indians' reserved rights or that the Indians anticipated the future sovereign power to limit.

Those cases are distinguishable upon the further ground that the grant of citizenship to Indians by the Act of June 2, 1924 (8 U. S. C. A., Sec. 3), enacted subsequent to decision of those cases, defi-

nately withdrew the Indians' tribal and other property, such as fishing rights, from the operation of police power affecting the rights of other citizens. In effect, it was so held in *Mason v. Sams*, 5 F. (2d) 255 (D. C. Wash.), where Judge Cushman for the court at pages 257 and 258 said:

"These Indian plaintiffs have been, by the Act of June 2, 1924 (43 Stat. at Large 1923-1924, part 1, page 253, c. 233), made citizens of the United States, with this proviso:

" 'That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.'

"Under the rule favoring the Indians in the interpretation of treaties and laws affecting them, already alluded to, any fishing rights of plaintiffs under the treaty are preserved by this proviso."

This Makah Treaty should have applied to it in favor of the Indians the rule of *Nielsen v. Johnson*, 279 U. S. 47, 51-52, applicable to Indian and other treaties, that: [38]

"Treaties are to be liberally construed so as to effect the apparent intention of the parties. (Citing cases.) When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, (citing cases), and as the treaty-

making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments. (Citing cases.) When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it. (Citing cases.)”

And the Supreme Court has held that an Indian treaty should be liberally construed so as to give effect to the meaning attached to the treaty by the Indians themselves. So in *Seufert Brothers Company v. United States*, 249 U. S. 194, 198, quoting in part from *U. S. v. Winans*, 198 U. S. 371, the court said:

“We will construe a treaty with the Indians as ‘that unlettered people’ understood it, and ‘as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,’ and counterpoise the inequality ‘by the superior justice which looks only to the substance of the right without regard to technical rules.’ 119 U. S. 1; 175 U. S. 1.”

No exception is made of state police power in the rule above quoted from *Nielsen v. Johnson*,

supra, when the court said that “* * * as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed (i. e., liberally) is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments”.

[39]

The decision of this court upon the motion for judgment on the pleadings is that judgment should be entered for plaintiffs in accordance with the prayer of their complaint.

An order may be settled upon notice or stipulation.

JOHN C. BOWEN

United States District Judge

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, May 1, 1941. Millard P. Thomas, Clerk. By Truman Egger, Deputy. [40]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause came regularly before this Court on Tuesday, the 15th day of April, 1941, upon the motion of defendants for judgment upon the pleadings, the plaintiffs appearing by Vanderveer, Bassett & Geisness and the defendants appear-

ing by Hon. Smith Troy, Attorney General of the State of Washington and T. H. Little, his Assistant; the Court heard oral argument made by John Geisness, of counsel for the plaintiffs, and T. H. Little, of counsel for the defendants, read and considered briefs submitted by both the plaintiffs and the defendants, and examined the records and files herein; it was stated in open court by the respective counsel for the plaintiffs and the defendants that they intend and expect that the decision upon said motion for judgment upon the pleadings shall result in a final decree in this cause and evidence was adduced in support of the allegations in the Bill of Complaint, without objection from the defendants; and the Court having rendered a written opinion, it now makes the following

FINDINGS OF FACT

I.

That the Makah Indian Tribe is a federal corporation [41] chartered under the laws of the United States with headquarters at Neah Bay, Washington, which has completed its organization under said laws and is a recognized and existing Indian organization.

II.

That the governing body of the Makah Indian Tribe, a corporation, consisting of a council known as the Makah Tribal Council or Council of the Makah Indian Tribe, which said council consists of

five (5) members as follows, to-wit: Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarty and Harold Ides.

III.

That all of the members of said Makah Indian Tribe are Makah Indians, and that this action is brought by said corporation and its tribal council for and on behalf of all of the members of the said tribe and on behalf of all of the Makah Indians by virtue of the power and authority there invested by the constitution and the charter of the said tribe and the laws of the United States under which said corporation was organized and now exists.

IV.

That the individual plaintiffs, in their individual capacity, bring this action on their own behalf and also on behalf of all of the other members of the said Makah Tribe of Indians who are similarly affected by the action of the defendants hereinafter described.

V.

That all of the individual plaintiffs and all of the members of the said Makah Indian Tribe, for and on behalf of whom this suit is instituted, are citizens of the United States; that the Makah Indian Tribe, a corporation, consists of numerous Makah Indians who are duly enrolled and recognized members of said tribe. [42]

VI.

That the defendant B. F. McCauly is the director of the Department of Game and Game Fish in the State of Washington and is now a resident of Seattle, King County, Washington, within the Northern Division of the Western District of Washington, and within the jurisdiction of this Court.

VII.

That the defendant B. M. Brennan is the director of the Department of Fisheries of the State of Washington and is now a resident of Seattle, King County, Washington, and within the Northern Division of the Western District of Washington and within the jurisdiction of this Court.

VIII.

That the defendant E. M. Benn is an inspector and game protector in the Department of Fisheries and Department of Game and Game Fish of the State of Washington, and is now a resident of Port Angeles, Clallam County, Washington, within the Northern Division of the Western District of Washington, and within the jurisdiction of this Court.

IX.

That the defendant Guy Burnham is a game protector in the Department of Game and Game Fish of the State of Washington, and is now a resident of Forks, Clallam County, Washington, within the Northern Division of the Western District of Washington, within the jurisdiction of this Court.

X.

That on the 31st day of January, 1855, Articles of Agreement and Convention were made and concluded at Neah Bay, in the Territory of Washington, between the United States of America, acting through its duly authorized agent and representative, and the Makah Tribe of Indians acting through its chiefs and head men and delegates of the several villages of said tribe, [43] thereunto duly authorized; that this treaty was ratified by the Senate of the United States March 8, 1859, and accepted and proclaimed by the President of the United States as the law of the land on April 18, 1859, which treaty reserved and secured to the members of the Makah Tribe of Indians, and to their posterity and successors in interest the right and privilege of taking fish at the usual and accustomed ground and stations; that at all times since it was originally made and concluded as aforesaid, said treaty has been and still is in full force and effect; that a true and correct copy of said treaty is attached to the bill of complaint, marked Exhibit "A" and incorporated therein by reference.

XI.

That the cause of action stated in said bill of complaint arises under the aforesaid treaty of the United States with the Makah Tribe of Indians. That this action involves the plaintiffs' asserted rights under the aforesaid Makah Indian treaty.

That from time immemorial, the Indians of the Makah Indian Tribes were accustomed to fish in

XII.

the Hoko River, from its mouth up to the spawning grounds of the fish in said river, in Clallam County, State of Washington, and that from time immemorial the whole of said Hoko River, from its mouth up to the aforesaid spawning grounds of the fish, has been a usual and accustomed fishing ground for the Indians of the Makah Tribe, where said Indians were accustomed to fish with seines, set nets, dip nets and other Indian fishing gear, at various, usual and accustomed stations well known to the defendants; that both the Hoko River and the land and territory constituting the Makah Indian Reservation, reserved from the lands and territory ceded by said treaty by the Government of the United States are in [44] the Northwest portion of Clallam County, Washington.

XIII.

That by reason of the reservation of the usual and customary fishing rights and privileges in and along the Hoko River, as described in said bill of complaint, and by reason of the governmental guarantee that such rights would be secured to the members of the Makah Indian Tribe, said plaintiffs herein and the members of the Makah Tribe of Indians, and all of them, continuously since said treaty was made and until stopped by the defendants as hereinafter set forth, took fish from the Hoko River with seines, set nets and dip nets, and any and all other Indian

fishing gear but were and are prevented from so doing by the wrongful acts of the defendants hereinafter described, although they still claim the right and privilege and attempted so to do; that the fishing rights as claimed and exercised with which the defendants are unlawfully interfering as hereinafter set forth, were a portion of those fishing rights and privileges guaranteed by the aforesaid treaty with the Makah, and were prior in point of time and interest to the alleged fishing rights of any white men or company or corporation whatsoever, or the State of Washington; that during all times until the year 1933, or immediately prior to first of said year, the plaintiffs herein and all of the members of the Makah Tribe of Indians for and on behalf of whom this action is brought, the posterity of the members of the Makah Tribe of Indians at the date aforesaid treaty with the Makahs was made and concluded, their forebears and predecessors, were not interfered with or molested in the exercise of their fishing rights and privileges as herein claimed, in and upon the Hoko River, by the State of Washington or its duly authorized agents and employees. [45]

XIV.

That at all times since about the first of the year 1933, the defendants, their agents, assistants and employees, have interfered with and intentionally deprived the Tribe of Makah Indians, and the individual plaintiffs herein, of their rights and privi-

leges of taking fish from their usual and accustomed place of fishing in the Hoko River and have intentionally prevented any fishing in any part of the Hoko River, by threatening to arrest and confiscate the fishing gear and equipment of any members of said Tribe fishing in or upon their aforesaid accustomed and usual fishing grounds and stations in the Hoko River, and the defendants will, unless enjoined and restrained by this Court, arrest any and all members of the Makah Tribe of Indians fishing in the Hoko River or any part thereof, and will also confiscate all their fishing gear and equipment; that the Makah Tribe of Indians is now and from time immemorial has been dependent to a very substantial degree upon fishing for food and livelihood, and that circumstance was recognized by the representatives of the United States Government when the aforesaid treaty with the Makah Tribe of Indians was made; that the Hoko River is and since time immemorial has been an important and valuable fishing place and that to deprive them of their right to fish in said river irreparably damages the plaintiffs and the members of the plaintiff Indian Tribe in an amount which cannot be accurately determined and materially impairs their principal source of food and livelihood.

XV.

That the value of the right in controversy exceeds for each of the above named plaintiffs, exclusive of interest and costs, the sum of \$3,000.00. [46]

XVI.

That neither the plaintiffs nor any of the members of the Makah Tribe of Indians nor any of their predecessors in interest, have at any time sold, assigned, transferred or conveyed his or their rights or privileges nor any part thereof, in and to the fishing at and in the Hoko River, or any part thereof, to the defendants or to anyone whomsoever, nor have the plaintiffs herein or any of them, or any of the members of the said Makah Tribe of Indians in particular, abandoned said fishing place or places, or his or the rights of the individual plaintiffs and the other members of the Makah Tribe of Indians to fish therein, nor has the United States of America ever in any manner limited or disposed of the fishing rights of the Makah Tribe of Indians.

XVII.

That all of the acts, claims and pretenses, threats and arrests made by the defendants, their officers, agents, assistants and employees, are contrary to law and equity and good conscience and tend to the manifest damage and oppression of the Makah Tribe of Indians, and of the plaintiffs herein named, and that the said defendants and each of them will continue, unless prevented by this Court, to deprive the said Tribe and plaintiffs herein, of their ancient, usual and accustomed fishing rights claimed under the aforesaid treaty between the United States of America and the Makah Tribe of Indians.

XVIII.

That the plaintiffs have no speedy or adequate remedy at law; that the defendants, and each and all of them, their officers, agents and employees will, by arrests and imprisonment and confiscation of property, entirely prevent the plaintiffs herein and the Makah Indians from fishing in their aforesaid usual and accustomed fishing place unless they and each of them [47] be enjoined by an injunction issued by this Court restraining and prohibiting said defendants and each of them from in any manner whatsoever interfering with the fishing operations and rights of the said Makah Indians in the Hoko River.

Done in Open Court this 3rd day of June, 1941.

JOHN C. BOWEN

Judge

From the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

That the plaintiffs have capacity to bring this action.

II.

That this case arises under a treaty of the United States and is not a suit against the State of Washington.

III.

That this court has jurisdiction of the subject matter of this action and of the parties thereto.

IV.

That the right and privilege of fishing in the entire Hoko River from its mouth up to the spawning grounds were reserved to the Makah Indian Tribe by the treaty between said Tribe and the United States Government made and concluded January 31, 1855 and proclaimed by the President of the United States April 18, 1859.

V.

That the individual plaintiffs and the other members [48] of the Makah Indian Tribe possess the right to fish in said usual and accustomed place under said treaty.

VI.

That the plaintiffs are entitled to a decree of this court permanently enjoining and restraining the defendants and each and all of them, together with their officers, agents, deputies, servants and employees, and all persons under their control or under the control of any of them, from in any manner whatsoever interfering with the exercise by the plaintiffs herein or any of the members of the Makah Indian Tribe of their rights and privileges of fishing in their usual and accustomed place hereinabove described and from in any manner whatsoever interfering with or preventing fishing by the plaintiffs herein, or any of the members of the Makah Indian Tribe in said usual and accustomed fishing place and from in any manner interfering

with or preventing the plaintiffs herein or any of the members of the Makah Tribe of Indians from selling their fish caught and taken at said fishing place.

Done in Open Court this 3rd day of June, 1941.

JOHN C. BOWEN

Judge

Presented by:

JOHN GEISNESS

of Vanderveer, Bassett & Geisness,

Attorneys for Plaintiff

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jun 3, 1941. Millard P. Thomas, Clerk. By J. M. A., Deputy. [49]

In the United States District Court
For the Western District of Washington,
Northern Division

No. 268

MAKAH INDIAN TRIBE, a corporation,
CHARLES E. PETERSON, PAUL PARKER,
ARTHUR CLAPLANHOO, JERRY McCARTY and HAROLD IDES, individually and as members of the Council of the Makah Indian Tribe,

Plaintiffs,

vs.

B. T. McCAULEY, B. M. BRENNAN, E. M. BENN and GUY BURNHAM,

Defendants.

DECREE

The above entitled cause came regularly before this Court on Tuesday, the 15th day of April, 1941, upon the motion of the defendants for judgment upon the pleadings, the plaintiffs appearing by Vanderveer, Bassett & Geisness, and the defendants appearing by Honorable Smith Troy, Attorney General of the State of Washington, and T. H. Little, his assistant; it was stated in open court by the respective counsel for the plaintiffs and the defendants that they intend and expect that the decision upon said motion for judgment upon the pleadings shall result in a final decree in this cause, and evi-

dence was adduced in support of the allegations in the bill of complaint, without objections from the defendants; the Court having heard oral argument made by John Geisness, of counsel for the plaintiffs, and T. H. Little, of counsel for the defendants, read and considered briefs submitted by both the plaintiffs and defendants, and examined the records and files herein, and the Court having rendered a written opinion and made Findings of Fact and Conclusions of law, it is now

ORDERED, ADJUDGED AND DECREED [50]

I.

That the entire Hoko River, from its mouth up to the spawning grounds of the fish on said river, is one of the usual and accustomed fishing places of the Makah Indian Tribe, as to which their rights and privileges of fishing were reserved by the Treaty with the Makah made and concluded January 31, 1855, and proclaimed by the President of the United States April 18, 1859.

II.

That the individual plaintiffs and other members of the Makah Indian Tribe possess the right to fish in said usual and accustomed place under said Treaty.

III.

That the defendants, and each and all of them, together with their officers, agents, deputies, servants and employees, and all persons under their control,

or under the control of any of them, are permanently enjoined and restrained from in any manner whatsoever interfering with the exercise by the plaintiffs herein, or any of the members of the Makah Indian Tribe, of their rights and privileges of fishing in their usual and accustomed place hereinabove described, and from in any manner whatsoever interfering with or preventing fishing by the plaintiffs herein, or any of the members of the Makah Indian Tribe, in said usual and accustomed fishing place, and from in any manner whatsoever interfering with or preventing the plaintiffs herein, or any of the members of the Makah Indian Tribe, from selling their fish caught and taken at said fishing place.

Done in open court this 3rd day of June, 1941.

JOHN C. BOWEN,

Judge.

Presented by:

JOHN GEISNESS,

Of Counsel for Plaintiffs.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 3, 1941. Millard P. Thomas, Clerk. J. M. A. Deputy. [51]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that B. T. McCauley, Director of Game of the State of Washington; B. M. Brennan, Director of Fisheries of the State of Washington; E. M. Benn, Inspector of the Department of Fisheries of the State of Washington; and Guy Burnham, Game Protector of the State of Washington, defendants herein, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final decree entered in this action on June 3, 1941.

Dated this 20th day of August, 1941.

SMITH TROY,

Attorney General,

State of Washington.

T. H. LITTLE,

Assistant Attorney General,

State of Washington

Attorneys for Defendants and
Appellants.

Address: Temple of Justice,

Olympia, Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Aug. 23, 1941. Millard P. Thomas, Clerk. By Truman Egger, Deputy. [52]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know all men by these presents:

That the undersigned, B. T. McCauley, Director of Game of the State of Washington, B. M. Brennan, Director of Fisheries of the State of Washington, E. M. Benn, Inspector of the Department of Fisheries of the State of Washington, and Guy Burnham, Game Protector of the State of Washington, in the above entitled action, as Principals, and Fireman's Fund Indemnity Company, a corporation organized under the laws of the State of California, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto the above entitled Makah Indian Tribe, a corporation, Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarthy and Harold Ides, individually and members of the Council of the Makah Indian Tribe, in the penal sum of Two Hundred Fifty Dollars, lawful money of the United States for the payment of which well and truly to be made, the said Principals and the said Surety bind themselves, [53] their heirs and personal representatives or successors jointly and severally, firmly by these presents.

Dated and sealed this 28th day of August, 1941.

Whereas, on the 3rd day of June, 1941, the above entitled Court rendered and entered a judgment or decree in the above entitled cause in favor of the above named obligees and against the above named principals;

And whereas, the said appellants feeling aggrieved by said judgment or decree and desiring to appeal from the same to the United States Circuit Court of Appeals for the Ninth Circuit; and perfect said appeal by this bond.

Now, therefore, the condition of the above obligation is such, that if the said appellants will pay all costs that may be awarded against them on said appeal or on the dismissal thereof, not exceeding Two Hundred Fifty Dollars, then this obligation shall be void, otherwise to remain in full force and virtue.

[Seal]

B. T. McCAULEY

[Seal]

B. M. BRENNAN

[Seal]

E. M. BENN

[Seal]

GUY BURNHAM

FIREMEN'S FUND INDEMNITY COMPANY

By M. F. MAURY,
Attorney-in-fact.

[Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Aug. 28, 1941. Millard P. Thomas, Clerk. By C. R. Fitzgerald, Deputy. [54]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD ON
APPEAL.

United States of America,
Western District of Washington—ss:

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 56, inclusive, is a full, true and complete copy of so much of the record, papers and **other** proceedings in the above and foregoing entitled cause as is required by Designation of Counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, Washington, and that the same constitute the record on appeal herein from the Decree of the United States District Court for the Western District of Washington granting the relief prayed for in the complaint to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellants for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit: [57]

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return, 154 folios at 05c (copies furnished)	\$ 7.70
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Rec- ord50
<hr/>	
Total	\$13.20

I hereby certify that the above cost for preparing and certifying record, amounting to \$13.20, has been paid to me by the attorneys for the appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 25th day of September, 1941.

[Seal] MILLARD P. THOMAS,
Clerk, United States District Court for the West-
ern District of Washington.

By TRUMMAN EGGER,
Deputy. [58]

[Endorsed]: No. 9924. United States Circuit Court of Appeals for the Ninth Circuit. B. T. McCauley, Director of Game of the State of Washington, B. M. Brennan, Director of Fisheries of the State of Washington, E. M. Benn, Inspector of the Department of Fisheries of the State of Washington, and Guy Burnham, Game Protector of the State of Washington, Appellants, vs. Makah Indian

Tribe, a corporation, Charles E. Peterson, Paul Parker, Arthur Claplanhoo, Jerry McCarthy and Harold Ides, individually and members of the Council of the Makah Indian Tribe, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed September 27, 1941.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 9924

MAKAH INDIAN TRIBE, a corporation,
CHARLES E. PETERSON, PAUL PARKER,
ARTHUR CLAPLANHOO, JERRY McCARTHY and HAROLD IDES, individually and as members of the Council of the Makah Indian Tribe,

Plaintiffs and Appellees.

vs.

B. T. McCAULEY, B. M. BRENNAN, E. M. BENN and GUY BURNHAM,
Defendants and Appellants.

STATEMENT OF POINTS RELIED UPON BY APPELLANTS

The following is a statement of points on which the appellants intend to rely on their appeal to the above entitled court from that certain decree entered by the United States District Court for the Western District of Washington, Northern Division, granting a permanent injunction, to wit:

I.

The District Court erred in denying defendants' motion to dismiss for want of jurisdiction of the defendants or of the subject matter of the action, in that

(a) The action in equity is one against public officers of the State of Washington as such, hence in truth and in fact an action against the State of Washington;

(b) This is an action against the state by Indians, who by Acts of Congress have been made citizens thereof, hence the United States District Court has no jurisdiction;

(c) Plaintiffs although citizens of the State of Washington are suing on behalf of the tribe, as wards of the Federal Government and as such have no legal capacity to sue due to their disability, and any action in their behalf must be brought by the United States Government, through the United States District Attorney.

II.

The District Court erred in issuing a preliminary injunction contrary to law.

III.

The District Court erred in denying defendants' motion for judgment on the pleadings as contrary to law. The court's action is repugnant to the following established principles which are involved herein:

(a) A state's police power is one of the highest attributes of sovereignty, and that power has never been delegated by the several states to the Federal Government.

(b) The police power can neither be abdicated nor bargained away, and is inalienable even by express grant.

(c) Upon admission into the Union, a state becomes possessed of all the rights and powers co-equal with her sister jurisdictions.

(d) The treaty making power was never intended to abridge the right of a state to regulate its strictly internal affairs. The Stevens Treaty of 1855 did not curtail or abridge the police power of the future State of Washington, and upon its admission into the Union, the state became endowed with full police powers.

(e) The protection of fish and the regulation of fishing is for the common benefit of the people, and legislation directed to that end is a valid and proper exercise of the police power. Over fish found within its waters, and over wild game, the state has supreme control.

(f) Fish and game laws of the State of Washington are regulatory measures and constitute a lawful exercise of the state's police power. They have for their purpose the necessary preservation of the state's commercial and game fisheries, and meet all the requirements that the lawful exercise of police power must be reasonable, nondiscriminatory and non-arbitrary.

(g) The fishing places in question are outside the boundaries of the Makah Reservation

and within the sole jurisdiction of the State of Washington.

(h) The Makah Indian Treaty secured to the members of the federated Makah Tribe a vested easement right of ingress to and egress from their "usual and accustomed grounds and stations" outside the reservation, there to fish "in common with all citizens of the United States"; subject to any valid exercise of the right by the sovereign which is operative on all alike for the best interests of the state's aquatic resources.

(i) Indian treaties are to be given a liberal construction, but must be considered in the light of current and economic conditions prevailing in the development and conservation of our natural resources, having in mind the welfare of all the people.

(j) The Indian, by Act of Congress in 1924, has been made a citizen of the United States and of the state in which he resides. As such, he is entitled to all the rights, privileges and immunities accorded other citizens of the state, and to the equal protection of its laws, and is also subject to its laws.

(k) Conservation of our fast diminishing natural resources is one of the chief concerns of organized government today. In the discharge of this important responsibility for and on behalf of its people, the state of Washington is acting as much in the interest of the Indian

citizen as any other, and its obligation toward him is just as great, for the Indian is now an integral part of its citizenry.

IV.

The District Court erred in entering Finding of Fact XVIII, in substance that the defendants will entirely prevent the plaintiffs from fishing unless the injunction became operative.

V.

The District Court erred in entering Conclusion of Law I, that the plaintiffs have capacity to bring this action.

VI.

The District Court erred in entering Conclusion of Law II, that this case is not a suit against the State of Washington.

VII.

The District Court erred in entering Conclusion of Law III, that the court had jurisdiction of the subject matter of the action and of the parties hereto.

VIII.

The District Court erred in entering Conclusion of Law IV, that the rights of fishing in the entire Hoko River from its mouth to the spawning ground were reserved to the Makah Indian Tribe by the treaty of 1855.

IX.

The District Court erred in entering its decree holding that the Makah Indians' right to fish at points off the reservation is not subject to state regulation, and permanently restraining the State law enforcement officers from interfering with plaintiffs' fishing operations at such places.

The appellants hereby designate the following parts of the record as necessary for the consideration of the above and foregoing points on which they intend to rely on appeal:

- (1) Plaintiffs' bill of complaint, with attached affidavit.
- (2) Defendants' special appearance and motion to dismiss.
- (3) Preliminary injunction entered by the District Court.
- (4) Defendants' motion to dismiss or in the alternative for judgment on the pleadings.
- (5) Stipulation that motion for judgment on the pleadings may be disposed of by a single District Judge in the event the statutory court finds it lacks jurisdiction.
- (6) Memorandum decision by the District Court.
- (7) Findings of Fact and Conclusions of Law entered by the District Court.
- (8) Decree entered by the District Court granting permanent injunction.
- (9) Notice of Appeal.
- (10) Cost Bond.

Dated this 17th day of September, 1941.

SMITH TROY,

Attorney General.

T. H. LITTLE,

Assistant Attorney General,

Attorneys for Appellants.

[Endorsed]: Filed Sept. 27, 1941. Paul P.
O'Brien, Clerk.